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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
A. The 20-year sentence from Maryland (imposed in September, 1954) now being served	4
B. The 20-year New York sentence (imposed on August 3, 1955) running concurrently with the Maryland sentence	6
C. The 12-year sentence (imposed on August 8, 1955), now under attack, running concurrently with the two previous 20-year sentences	7
Summary of argument	11
Argument:	
I. The post-sentence remedy in 28 U.S.C. 2255 is not applicable to an attack upon a concurrent sentence where the claimant cannot be released or secure any benefits from the proceeding, even if successful	14
A. This proceeding does not lie because petitioner can obtain no relief	14
B. The language and history of 28 U.S.C. 2255 indicate that petitioner is not entitled to seek relief under that Section	18
II. The petitioner has not alleged sufficient facts to entitle him to a hearing under 28 U.S.C. 2255	27
Conclusion	32
Appendix	33

CITATIONS

Cases:

Biddle v. *Thiele*, 11 F. 2d 235	16
Boardman, In re, 169 U.S. 39	25
Bonner, In re, 151 U.S. 242	26
Brooks v. *United States*, 267 U.S. 432	15
Brown v. *Allen*, 344 U.S. 443	31
Chandler v. *Fretag*, 348 U.S. 3	25

Cases—Continued

	Page
Claassen v. *United States*, 142 U.S. 140	15
Clark v. *United States*, 267 F. 2d 99	17
Classen v. *United States*, 142 U.S. 239	15
Clifton v. *United States*, 4 How. 242	15
Duggins v. *United States*, 240 F. 2d 479	26
Eagles v. *Samuels*	25
Fiswick v. *United States*, 329 U.S. 211	16
Friedman v. *United States*, 200 F. 2d 690, certiorari denied, 345 U.S. 926	30
Gonzalez v. *United States*, 224 F. 2d 431	16
Heflin v. *United States*, 358 U.S. 415	12, 17, 19, 21
Hirabayashi v. *United States*, 320 U.S. 81	15
Hoffman v. *United States*, 244 F. 2d 378	26
Holiday v. *Johnston*, 313 U.S. 342	21, 25
Lawn v. *United States*, 355 U.S. 339	15
Locke v. *United States*, 7 Cranch. 339	15
McGann v. *United States*, 249 F. 2d 431	5
McGann v. *United States*, 261 F. 2d 956, certiorari denied, 359 U.S. 974	5
McGann v. *United States*, 352 U.S. 904	7
McNally v. *Hill*, 293 U.S. 131	17, 21, 25
Meredith v. *United States*, 208 F. 2d 680	29
Miller v. *United States*, 256 F. 2d 501	26
Oughton v. *United States*, 215 F. 2d 578, certiorari denied, 352 U.S. 975	26
People v. *Gorney*, 103 N.Y.S. 2d 75	17
People v. *Spellman*, 242 N.Y.S. 68	17
People v. *Warden of Auburn State Prison*, 84 N.Y.S. 2d 43	17
Pierce v. *United States*, 252 U.S. 239	15
Pinkerton v. *United States*, 328 U.S. 640	15
Price v. *Johnston*, 334 U.S. 266	28
Prince v. *United States*, 352 U.S. 322	21
Roviaro v. *United States*, 353 U.S. 53	15
Singer v. *United States*, 278 Fed. 415, certiorari denied, 258 U.S. 620	16
Smith v. *United States*, 213 F. 2d 730	29
Snyder v. *United States*, 112 U.S. 216	15
State v. *Mayo*, 90 So. 2d 455	17
State v. *Vaccaro*, 200 La. 475	17
Sullivan v. *United States*, 348 U.S. 170	29
Sunal v. *Large*, 332 U.S. 174	30

Cases—Continued

	Page
Sweeden v. *United States*, 209 F. 2d 524	29
Terwilliger v. *Turk*, 281 N.Y.S. 527	17
Toliver v. *United States*, 249 F. 2d 804	26
United States v. *Harris*, 160 F. 2d 507	29
United States v. *Hayman*, 342 U.S. 205	12, 19, 25
United States v. *Hines*, 256 F. 2d 561	15
United States v. *McGann*, 150 F. Supp. 463	4
United States v. *McGann*, 161 F. Supp. 629	5
United States v. *McGann*, 245 F. 2d 670	6, 7, 18, 26
United States v. *Morgan*, 346 U.S. 502	16
United States v. *Page*, 229 F. 2d 91	29
United States v. *Robinson*, No. 16, this Term, decided January 11, 1960	30
United States v. *Sheridan*, 329 U.S. 379	15
United States v. *Smith*, 257 F. 2d 432, certiorari denied, 357 U.S. 926	8, 28
United States v. *Swaggerty*, 218 F. 2d 875, certiorari denied, 349 U.S. 959	30
United States v. *Winhoven*, 14 F. R. D. 18	26
Waley v. *Johnston*, 316 U.S. 101	29
Walker v. *Johnston*, 312 U.S. 275	28
Watkins, Ex parte, 3 Pet. 193	25
Williams v. *United States*, 236 F. 2d. 894, certiorari denied, 352 U.S. 982	26
Winhoven v. *United States*, 209 F. 2d 417	26
Wong Doo v. *United States*, 265 U.S. 239	31

Statutes and rules:

62 Stat. 967	22
18 U.S.C. 2111	7
18 U.S.C. 4161	17
18 U.S.C. 4202	17
28 U.S.C. 2255	2, 4, 5, 6, 7, 9, 11, 12, 13, 14, 17, 18, 23, 24, 25, 26, 27, 29
Fed. Rules of Crim. Proc.:	
Rule 20	16
Rule 23(c)	29
Rule 32(d)	6, 29
Rule 35	21
Rule 45(c)	23

Miscellaneous:

	Page
5 A.L.R. 2d 1080	16
24 A.L.R. 2d 1247	16
94 Cong. Rec. 7709-7710	22
H. R. 4233, 79th Cong., 1st Sess.	22
H. R. 6723, 79th Cong., 2d Sess.	23
Report of the Judicial Conference, 1943	21, 22
Report of the Habeas Corpus Committee, 1943 Judicial Conference	20, 21, 33
Report of the Habeas Corpus Committee of the Judicial Conference, 1947 Special Session	24, 49
Supplemental Report of the Habeas Corpus Committee, 1943 Judicial Conference	21, 46
S. 20, 80th Cong., 2d Sess.	22
S. 1451, 79th Cong., 1st Sess.	22
5 Wharton's *Criminal Law and Procedure* (1957)	16

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE MCGANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decisions of the District Court (R. 5, 40-42) and the orders of the Court of Appeals (R. 17-18, 21, 54) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1959 (R. 54). The petition for a writ of certiorari was filed on March 23, 1959, and was granted on June 29, 1959 (R. 55). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the post-sentence remedy provided by 28 U.S.C. 2255 is applicable when the petitioner cannot

obtain release from custody, or other advantage, even if he were successful.

2. Whether the petitioner has alleged sufficient facts to entitle him to a hearing on his contention that his plea of guilty was improperly induced.

STATUTES INVOLVED

28 U.S.C. 2255 provides:

FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that

the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT

The petitioner, who is now serving a 20-year sentence for bank robbery imposed by the Maryland District

Court and also a concurrent 20-year sentence for bank robbery imposed by the District Court for the Southern District of New York, filed a motion under 28 U.S.C. 2255, attacking the validity of a concurrent 12-year sentence for bank robbery imposed by the District Court for the Eastern District of New York. It is the denial of the motion as to this latter sentence, and the dismissal on the government's motion of the petitioner's second appeal to the Court of Appeals, which are under review in this proceeding.

A. *The 20-year sentence from Maryland (imposed in September 1954) now being served*

Petitioner's Maryland sentence is not here under attack. On August 13, 1954, the petitioner and two others—Earl Kill Smith and Henry John Foster—robbed a bank at the Andrews Air Force Base of over $124,000. The petitioner was arrested as he was fleeing. See *United States* v. *McGann*, 150 F. Supp. 463, 464 (D. Md.) Three indictments were returned. One charged bank robbery with a dangerous weapon, a second the interstate transportation of a stolen motor vehicle, and the third robbery from a person within the special territorial jurisdiction of the United States. The trial court appointed two attorneys to represent the petitioner. After preliminary medical reports as to the petitioner were received, the petitioner, with his two appointed counsel present, entered a plea of guilty as to all the offenses. On September 20, 1954, he was sentenced to 20 years on the bank robbery indictment and 5 years on each of the other offenses—all to be served concurrently. No appeal was taken.

United States v. *McGann*, 161 F. Supp. 629 (D. Md.)

Petitioner has since attacked this sentence collaterally at least four times. First, on June 5, 1957, he filed a petition for a writ of habeas corpus which was treated as a motion under 28 U.S.C. 2255. He claimed the indictment was bad because the institution robbed was not an insured bank, but only an Air Force Base bank. The Court of Appeals affirmed *per curiam* the denial of this motion. *McGann* v. *United States*, 249 F. 2d 431 (C.A. 4).

His second petition for release on habeas corpus was denied May 2, 1958, by the district judge. The petitioner there claimed double jeopardy in that the two robbery indictments constituted the same offense. The court found that the offenses were not the same and in any event that petitioner was not entitled to release from the longer of the concurrent Maryland sentences. See *United States* v. *McGann*, *supra*, 161 F. Supp. at 633 (D. Md.). Although granted permission to appeal in forma pauperis, the petitioner chose to file a third attack. See *McGann* v. *United States*, 261 F. 2d 956, 958 (C.A. 4).

The third motion was substantially the same as the second, and was accordingly denied. On appeal, this was affirmed both on the merits and procedurally. The court also found that, even if the 5-year sentence were invalid, the 20-year sentence for bank robbery was valid. *McGann* v. *United States*, 261 F. 2d 956 (C.A. 4). This Court denied a petition for a writ of certiorari. 359 U.S. 974.[1]

[1] Petitioner's fourth attack raised the same contention but under the label of coram nobis. This series is not officially reported. See No. 488 Misc., this Term, now pending in this Court.

B. *The 20-year New York sentence (imposed on August 3, 1955) running concurrently with the Maryland sentence.*

The sentence from the Southern District of New York is also not under attack in the present case. On August 12, 1954, the petitioner and the same two confederates robbed a bank in Harlem in the Southern District of New York. On June 28, 1955, the petitioner pleaded guilty and on August 3, 1955, was sentenced to 20 years' imprisonment to be served concurrently with the 20-year sentence imposed in Maryland. On both dates he was represented by his court-appointed counsel, Samuel W. Altman, Esq.—"a lawyer with many years' experience at the federal criminal bar": *United States* v. *McGann*, 245 F. 2d 670, 671 (C.A. 2).

He has since made three attacks on this sentence. First, on August 11, 1955, he filed a petition for a writ of habeas corpus claiming that his plea was under undue duress and hardship. This was denied on September 13, 1955, and no appeal was taken. 245 F. 2d at 671.

On December 12, 1955, the petitioner moved to withdraw his plea of guilty under Rule 32(d) of the Federal Rules of Criminal Procedure. He claimed that his plea was made under undue influence and coercion of his court-appointed counsel. This motion was denied on December 19, 1955, and no appeal was taken. *Id.* at 671.

On January 30, 1956, he filed his third post-conviction motion. This was under 28 U.S.C. 2255. He claimed that his court-appointed counsel had told him

that the United States Attorney would ask that no sentence be imposed and that the United States Attorney had confirmed these promises. This was in conflict with affidavits filed by the former court-appointed attorney and the prosecutor. The District Court denied the motion on the basis of the files and records.[2] On appeal, the Court of Appeals for the Second Circuit on June 14, 1957, held there was no occasion to consider the merits of petitioner's claim, since a motion under 28 U.S.C. 2255 is not available to determine a question which could not result in the release of the petitioner. *United States* v. *McGann*, 245 F. 2d 670, 672.

C. The 12-year sentence (imposed on August 8, 1955), now under attack, running concurrently with the two previous 20-year sentences.

The present action relates to a 12-year sentence imposed by the District Court for the Eastern District of New York. On April 21, 1954, the petitioner and his confederate, Earl Kill Smith, committed an armed robbery at the Veterans Administration Hospital, Brooklyn. He was indicted in one count for this offense under 18 U.S.C. 2111—robbery within the special territorial jurisdiction of the United States (R. 12-13). On May 9, 1955, the trial court assigned Mr. Benjamin Glass as counsel. After a conference with counsel, the petitioner pleaded not guilty (R. 13). On July 8, 1955, with counsel present and having been warned of his rights, the petitioner voluntarily withdrew his plea

[2] Thereafter, there was a dismissal of the appeal which this Court reversed *per curiam* for consideration by the Court of Appeals on the merits of the appeal. *McGann* v. *United States*, 352 U.S. 904.

of not guilty and entered a plea of guilty (R. 41). On August 8, 1955, with counsel present, the court denied the petitioner's motion to withdraw his plea and sentenced him to 12 years, to be served concurrently with the previous 20-year Maryland sentence (R. 48).

On October 30, 1957, the petitioner made a motion for reduction of sentence, which was denied on November 4, 1957 (R. 48).

On April 7, 1958, the petitioner filed a motion under 28 U.S.C. 2255, collaterally attacking the 12-year sentence (R. 1-4). He claimed that his plea of guilty had been entered under duress and that the trial court committed reversible error in refusing to allow him to withdraw the plea (R. 2-3). The trial court denied the motion on April 8, 1958 (R. 5), noting that petitioner's claim of duress was not amplified and further that the

> record shows that defendant was fully informed and advised of his rights, and had the benefit of counsel, before acceptance of the plea.

The petitioner sought leave from the District Court to appeal in forma pauperis (R. 6-7). This was denied for the reasons stated in the memorandum opinion and on the ground "that the Appeal is not taken in good faith" (R. 9).

Leave to appeal in forma pauperis (R. 9-10) was denied in the Court of Appeals (R. 17),[3] but on petition

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[3] The petitioner's request for counsel was based upon the theory that, since leave to appeal in forma pauperis had been granted his co-defendant Earl Kill Smith, petitioner was entitled, as of right, to the same (R. 11). Later, the petitioner claimed that the *Smith* case (*United States* v. *Smith*, 257 F. 2d 432 (C.A. 2), certiorari denied, 357 U.S. 926) was not like his (R. 19).

for rehearing the court noted that the denial was without prejudice to another motion in the District Court upon a different and more complete statement of facts (R. 21).

Thereafter, the petitioner filed another motion in the District Court for the Eastern District of New York, also under 28 U.S.C. 2255 (R. 22-23). In this motion he claimed that the trial court committed reversible error in not allowing him to withdraw his plea of guilty (R. 24). He further claimed that his plea was coerced because his lawyer in the Southern District of New York had told him that the government would ask for a light or suspended sentence if he pleaded guilty (R. 26); that he changed his plea in the Southern District and then the United States Attorney for the Southern District "confirmed" the promise and requested that the petitioner also change his plea in the Eastern District (R. 27); that Miss Marie McCann, Assistant United States Attorney for the Eastern District, was called and that she made the same agreement (R. 27). He alleged that the reason he wanted to withdraw his guilty plea in the Eastern District was because the United States Attorney in the Southern District had not kept the promise on his sentence in that district (R. 31-32).

The government filed an affidavit by Miss Marie L. McCann, an Assistant United States Attorney for the Eastern District of New York (R. 35-39). She called attention to the fact that the petitioner had unsuccessfully litigated the "promise questions" in the Southern District of New York and was now seeking to relitigate the same issues in the Eastern District (R. 37). She

categorically denied that she or the other Eastern District Assistant United States Attorney had made any promise of a suspended sentence to the petitioner when they saw him prior to sentence (R. 38). She stated that Mr. Leisure, formerly an Assistant United States Attorney in the Southern District, had stated his willingness to submit an affidavit that he had not promised the petitioner a suspended sentence (R. 38).

On November 18, 1958, the trial court denied petitioner's motion and filed a memorandum (R. 40-42), indicating that the substance of the allegations had been previously urged (R. 40) and that, while represented by counsel, petitioner had changed his plea to one of guilty (R. 41):

> The record shows that he took this step of his own volition and that he was then informed that the court had the power to and might sentence him to imprisonment, without mention of its extent.

The court noted that, even if the district attorneys had agreed to ask for lighter sentences, this could have added nothing to petitioner's legal rights or altered his status in court with respect to fixing the punishment (R. 42). The court also noted that petitioner's Maryland sentence would be unaffected by the proceedings (R. 42).

The petitioner again applied to the District Court for leave to appeal in forma pauperis which was denied on December 14, 1958 (R. 46). He next petitioned the Court of Appeals for leave to appeal in forma pauperis (R. 43-44). The government moved to dismiss the appeal as completely without merit and frivolous on its

face (R. 47-50). On March 5, 1959, the Court of Appeals denied the petitioner's motion and granted the cross-motion to dismiss the appeal (R. 54).

SUMMARY OF ARGUMENT

I

The post-sentence remedy in 28 U.S.C. 2255 is not applicable to an attack upon a concurrent sentence where the claimant cannot be released or secure any benefit from the proceeding, even if successful.

A. 1. The petitioner is here seeking to attack, by a motion under 28 U.S.C. 2255, a 12-year sentence imposed in the Eastern District of New York. He is also now serving two 20-year concurrent sentences imposed in other districts (Maryland and the Southern District of New York). As long as these two 20-year sentences stand, vacation of the 12-year sentence, which runs concurrently with the 20-year sentences, can result in no benefit to the petitioner. Refusal to consider his challenge to the 12-year sentence would accord with the policy of a long line of decisions in this Court that appellate courts need not review the correctness of each count of multiple convictions, even on direct review, where there are sufficient counts to warrant the sentence. Furthermore, vacation of the 12-year sentence would have no effect on petitioner's total sentence, nor parole, nor computation of good time.

2. If the petitioner could gain no relief in any jurisdiction solely because of other outstanding concurrent sentences, he could then resort to habeas corpus as provided in Section 2255 where the motion remedy is inadequate. This petitioner does not have such a problem because he has not been denied relief on his 20-year

Maryland sentence because of either New York sentence, but solely on the merits.

B. The language and history of 28 U.S.C. 2255 indicate that petitioner is not entitled to seek relief under that section.

1. The rationale of this Court's recent ruling in *Heflin* v. *United States*, 358 U.S. 415, applies to the concurrent sentences here—*i.e.*, unless the prisoner can claim "the right to be released" if his motion is successful, the statute is inapplicable.

2. a. The Judicial Conference, which proposed this legislation, deliberately changed the wording of the bill from making the new remedy applicable to any judgment that is "void" to having it applicable instead only where one can claim "the right to be released".

b. The insertion of the sentence in Section 2255 to the effect that "A motion for such relief may be made at any time" did not change the requirement that the statute was only to be applicable to those claiming release. At best, it only made more certain that the expiration of the term or that lapse of time was not a bar to the applicability of the remedy.

3. The judicial interpretation of Section 2255 has been uniform in not extending the statute to one serving concurrent sentences who cannot claim the right to release even if successful. This follows the practice of not extending habeas corpus to one who could not gain release. Since Section 2255 merely affords the same rights as habeas corpus in another forum (*United States* v. *Hayman*, 342 U.S. 205, 219), the lower courts

have refused to extend the scope of this section where the applicant could not be released even if successful.

II

In any event, the petitioner has not alleged sufficient facts to entitle him to a hearing under 28 U.S.C. 2255.

A. The record shows that he entered his plea of guilty while represented by an attorney and that he was informed that the court had power to sentence him to imprisonment, without mention of its extent. The petitioner does not challenge this. In these circumstances his claim that an Assistant United States Attorney told him that she would ask for a light or suspended sentence is not sufficient to overcome the record of a voluntary plea of guilty, and to require a hearing. Petitioner's allegations, even if true, would not amount to coercion or undue influence with respect to his plea.

B. Moreover, the trial court denied petitioner's motion to withdraw his guilty plea. Petitioner claims that this denial was incorrect, but the proper way to test this claim would have been by appeal. The petitioner had a lawyer and was himself competent to challenge this action. Actually, the record suggests that the petitioner deliberately decided not to appeal, was satisfied with his sentence, and therefore purposely abandoned any claim that his guilty plea was not voluntary. He should not now be allowed to raise this same issue on collateral attack.

ARGUMENT

I

The Post-Sentence Remedy in 28 U.S.C. 2255 Is Not Applicable to an Attack Upon a Concurrent Sentence Where the Claimant Cannot Be Released or Secure Any Benefits from the Proceeding, Even If Successful

The petitioner is here seeking to attack, by a motion under 28 U. S. C. 2255, a 12-year sentence imposed for robbery in the Eastern District of New York. He is also now serving two 20-year concurrent sentences imposed in other districts (Maryland and the Southern District of New York). It is the government's position that in this situation the petitioner cannot gain any practical relief as a result of this proceeding, and hence that the remedy of 28 U. S. C. 2255 is not now available to attack the 12-year sentence. This conclusion stems not only from the limitations in the statute itself, but also from the broad policy against requiring the courts to consider issues which cannot result in benefit to the petitioning litigant.

A. This proceeding does not lie because petitioner can obtain no relief

1. At the time the sentence here under attack was imposed by the District Court for the Eastern District of New York on August 8, 1955, petitioner was already under two 20-year sentences—one imposed September 20, 1954, by the District Court for Maryland and one imposed August 3, 1955, by the District Court for the Southern District of New York. The present sentence of 12 years runs concurrently with those 20-year sentences, and, so long as those two sentences stand, vacation of the 12-year sentence can result in no benefit to

petitioner. There was thus no occasion for the courts below to consider petitioner's attack upon that sentence.

This is in conformity with the well-established judicial policy of not deciding issues which can have no material effect on the rights or status of the litigants. This Court in a long line of decisions has ruled that it will not review the correctness of each count of multiple convictions, even on direct review, when there are sufficient counts to warrant the sentence. *Locke* v. *United States*, 7 Cranch. 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216, 217; *Claassen* v. *United States*, 142 U. S. 140, 146; *Pierce* v. *United States*, 252 U.S. 239; *Brooks* v. *United States*, 267 U. S. 432; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 642, fn. 1; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Lawn* v. *United States*, 355 U.S. 339, 359. Thus, if the petitioner had received his concurrent sentences of two 20-year terms and one 12-year term all at one time in one court there would be no reason to review *only* the 12-year term, even on direct appellate review. Certainly, there should be less reason to allow such a review, many years after, on collateral attack.

Petitioner can gain no present material advantage by this proceeding, regardless of results, except perhaps a few weeks outside the penitentiary to attend a hearing. Since this 12-year sentence was imposed after the two longer sentences, there can be no claim, such as is sometimes made as to multiple counts, that vacation of this sentence might affect the total length of the others. Cf. *United States* v. *Hines*, 256 F. 2d

561 (C.A. 2). With the other two longer sentences outstanding, this conviction can have little or no effect on petitioner's status as a recidivist if he should commit another crime after release. Cf. *United States* v. *Morgan*, 346 U.S. 502, where the claimant was serving subsequent sentences as a multiple offender.[4] Also, with the other two longer sentences outstanding, the sentence could have no effect in deportation even if petitioner were an alien. Cf. *Fiswick* v. *United States*, 329 U.S. 211. And, unlike the situation in *McNally* v. *Hill*,

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[4] Whether this conviction can have any effect at all for purposes of application of various state habitual criminal statutes contains too many variables to be susceptible of precise forecasting. The whole question is, of course, based upon an assumption (not necessarily warranted) that, upon release, the petitioner would commit another crime and be convicted in a state. On this assumption, the first variable would be whether all or part of the 5 federal indictments against petitioner would be considered as previous crimes by the particular state. Another would be whether this petitioner would be treated differently because he pleaded to these indictments in three jurisdictions rather than in one jurisdiction under Rule 20 of the Federal Rules of Criminal Procedure, and in any event received concurrent sentences. Finally, we may also find a difference in treating prior convictions within a particular state, based upon whether one is a second or third offender as compared to a fourth offender. See generally 5 A.L.R. 2d 1080; 24 A.L.R. 2d 1247; 5 Wharton's *Criminal Law and Procedure* (1957) 435-441.

Generally, and in the limited number of federal recidivist statutes relating to prior convictions for similar offenses (of which robbery is not one), there must be a prior adjudication of guilt and another offense after the prior conviction and service of the prior sentence. *Singer* v. *United States*, 278 Fed. 415 (C.A. 3), certiorari denied, 258 U.S. 620; *Gonzalez* v. *United States*, 224 F. 2d 431 (C.A. 1); *Biddle* v. *Thiele*, 11 F. 2d 235 (C.A. 8). Under this pattern of legislation, the sentence here could have no separate effect even if petitioner became subject to a state habitual criminal statute, so long as his two other sentences remained outstanding. The sentence at issue would add nothing.

In other states it is possible that the conviction at issue would be counted separately on the theory that separate crimes were

293 U.S. 131, or *Heflin* v. *United States*, 358 U.S. 415, petitioner cannot even claim that this decision will have any legal effect upon possible parole (see 18 U.S.C. 4202; *Clark* v. *United States*, 267 F. 2d 99, 102 (C.A. 4)), or on computation of good time. 18 U.S.C. 4161. This judgment thus has no present practical or legal significance for petitioner, and there is no reason for the courts to consider his attacks on it, until such time as some real benefit to him may result from a determination of the validity of his 12-year sentence.

2. Under our view, a prisoner serving two or more concurrent sentences imposed by different district courts, who wished to obtain release by attacking all his sentences, would not be precluded from relief. If the respective district courts refused to consider applications under Section 2255 because of the other concurrent sentences, the prisoner could resort to habeas corpus in the district of his confinement under the provisions for such action in 28 U.S.C. 2255 (*supra*, p. 3) where "the remedy by motion is inadequate or ineffective to test the legality of his detention." However, this is *not* this petitioner's problem, as he has not been denied relief from his first 20-year sentence in Maryland, either in the District Court or the Court of Appeals for the Fourth Circuit, on the basis of the contention that either New York sentence remained to be served.[5]

committed. *State* v. *Vaccaro*, 200 La. 475; *Terwilliger* v. *Turk*, 281 N.Y.S. 527 (Sup. Ct.); *People* v. *Warden of Auburn State Prison*, 84 N.Y.S. 2d 43 (Sup. Ct.); *People* v. *Gorney*, 103 N.Y.S. 2d 75 (Sup. Ct.). On the other hand, see *People* v. *Spellman*, 272 N.Y.S. 68 (Sup. Ct.); *State* v. *Mayo*, 90 So. 2d 455 (Sup. Ct. Fla.).

[5] The Maryland sentence, which was imposed first, was not in terms concurrent to any other sentence. No question as to pe-

B. *The language and history of 28 U.S.C. 2255 indicate that petitioner is not entitled to seek relief under that Section*

This Court recently held in *Heflin* v. *United States*, 358 U.S. 415, that relief under 28 U.S.C. 2255 is not available to a prisoner who has not yet begun to serve the sentence he is attacking. The considerations which led the Court to reach that conclusion apply as well to the situation here. The background, history, and judicial interpretation of Section 2255 likewise support that view.

1. The pertinent language of the statute is:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

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tioner's lack of standing to attack the Maryland sentence was ever raised because of the outstanding New York sentences.

The possibility that the New York sentence of 20 years, which was imposed almost one year after the Maryland sentence, could have had the effect of extending the petitioner's total sentence was called to the sentencing judge's attention by the concurring judge in *United States* v. *McGann*, 245 F. 2d 670, 672-673 (C.A. 2), and resulted in an amended order of commitment.

There is no question that, as he argues, petitioner is now in custody under the sentence which he seeks to attack, and to that extent his case is factually different from the case where a prisoner seeks to obtain relief from a consecutive sentence which he may not yet be serving, *e.g. Hoffin* v. *United States*, *supra*. However, the rationale of the ruling on the consecutive sentence problem also applies to the concurrent sentences here—unless the prisoner can claim "the right to be released" if his motion is successful, the statute forbids its use as a post-trial remedy. The language, which was deliberately chosen by the Judicial Conference (see *infra*, pp. 20-21, 48), does not say that the prisoner is entitled to use this remedy wherever he claims the right to be released from the particular sentence he challenges. To the contrary, it reads "claiming the right to be released"—without qualification. As in habeas corpus, the prisoner must demand his freedom. Since petitioner cannot claim the right to be released even if the 12-year sentence he is attacking were to be vacated, because he is concurrently serving two longer sentences, the statute is inapplicable to this case.

2. The general background of Section 2255 was canvassed in *United States* v. *Hayman*, 342 U.S. 205, with specific reference to the various proposed bills and the proceedings of the Judicial Conferences of the United States which inaugurated this form of action. The history is further detailed in an appendix to the government's brief in *Hayman*, which reprints the reports and memoranda submitted to and by the Judicial Conference in connection with the proposal. See the government's brief in No. 23, O.T. 1951, pp. 87-186. We

have reprinted the pertinent parts as an Appendix, *infra*, pp. 33-56. For the question at issue here, it is necessary only to trace the source and the possible purpose of the key language quoted above.

a. In the first report of the special committee of the Judicial Conference the draft of the present statute (then Section 2 of the jurisdictional or "A" statute) began:[6]

> SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered.

The report of the Committee in commenting on this section stated (App. *infra*, pp. 38-39):

> Section two applies only to prisoners in custody under judgments of federal courts. The first part of the section provides for a motion, in the nature of a writ of error coram nobis, in the court in which the prisoner was convicted, to question the validity of a judgment assailed on the ground that it was entered in violation of prisoner's constitu-

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[6] See Report of the Habeas Corpus Committee, submitted at the 1943 session of the conference, Appendix, *infra*, pp. 33-46, 43. While the Committee presented two versions of Section 2, they were identical with respect to the language here quoted.

> tional rights. It is believed that this part of the section is merely declaratory of existing law. *Holiday* v. *Johnston*, 313 U.S. 342, 349. All members of the Committee agree on this part of the section.

Thus, "custody" under the judgment to be attacked was considered essential from the outset. This appears from the express words used by the Committee in the proposed statute and the unanimous comment of its members. The citation of *Holiday* v. *Johnston*, 313 U.S. 342, 349, is also significant because in that case, this Court affirmed the doctrine of *McNally* v. *Hill*, 293 U.S. 131, that habeas corpus could not be used where a successful claimant would not be entitled to immediate release. The Court ruled that since *Holiday* had a consecutive sentence, under which he was not yet in custody, resort to habeas corpus was premature.[7]

On the day before the 1943 meeting of the Judicial Conference, after receiving letters from various judges, the Committee met and prepared a Supplemental Report (App. *infra*, pp. 46-48). Of present significance was the elimination of the words "that the judgment is void because", and substitution of the words "the right to be released on the ground that the judgment has been obtained" (App. *infra*, p. 48).

As thus adopted and recommended by the Judicial Conference the bill read in pertinent part (Report of the Judicial Conference, 1943, p. 24):

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[7] The Court did hold that he could move to vacate his sentence. This is in conformity with the present use of Rule 35, Federal Rules of Criminal Procedure; *Heflin* v. *United States*, 358 U.S. 415; *Prince* v. *United States*, 352 U.S. 322.

> Sec. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, *claiming the right to be released* on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. [Emphasis added.]

The Committee stated (Report of the Judicial Conference, 1943, p. 22):

> The jurisdictional bill, statute "A", was substantially amended by the committee just prior to the Conference and received additional amendments at the Conference.[8]

This history indicates that, prior to consideration by the whole conference, the scope of the proposed statute was deliberately changed so as to confine its operation to situations where the right to release was claimed. It was not made applicable to all void judgments. To interpret the statute as applicable to all void judgments, regardless of the prisoner's right to be released, would be to read it as it was prior to this explicit change, not as it was ultimately proposed and enacted.

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[8] A variant of this proposal was then submitted to Congress with interim additions not here relevant. While this was submitted to the House (H.R. 4233) and Senate (S. 1451) of the 79th Congress, 1st Sess., and also passed the Senate (S. 20) in the 80th Cong., 2d Sess., 94 Cong. Rec. 7709-7710, June 40, 1948, the actual enactment took place in the codification of Title 28, 62 Stat. 967.

b. There was one further change which may be thought material. Between the time of the final proposal and the enactment of the measure as Section 2255 of Title 28, the following words were eliminated at the end of the first sentence of Section 2, *infra*, p. 43:

> notwithstanding the expiration of the term at which such judgment was entered.

A one-sentence paragraph was substituted:

> A motion for such relief may be made at any time.

While we have found no explicit statement in the available historical material which explains why this change was made, several reasons are possible. A provision that a motion for relief may be made at any time is an affirmative (and therefore more positive) grant than the negative phrase "notwithstanding the expiration of the term". It may have been substituted merely as a more appropriate manner of expressing the lack of a legal time limitation. It is also more consonant with modern criminal practice since the significance of the legal "term" and the usual legal implications of the expiration of the term have been abolished. Rule 45(*c*) of the Rules of Criminal Procedure.

Another consideration which may have some bearing is the fact that, while the original proposals were pending, another somewhat similar bill was presented to Congress, H.R. 6723, 79th Cong., 2d Sess. This bill provided (in part):

> Any motion under this section shall be filed within one year (a) after the effective date of this Act, or (b) after the discovery by movant of

> facts upon which he relies for relief, or (c) after any change of law, by statute or controlling decision, occurring subsequent to imposition of sentence and upon which he relies for relief. The burden of establishing that the motion was timely filed shall be upon the movant; and failure to file such motion within such time shall bar relief by the writ of habeas corpus unless it appears that it would not have been practicable to determine petitioner's rights to discharge from custody on such motion if the motion had been filed in time.
> * * *

This imposition of a time limit later evoked the unanimous disapproval of the Committee of the Judicial Conference.[9] The present wording may therefore have been designed to make clear that no specific time limitation was applicable to the new remedy.

In any event, we think the words in context can only have meaning in relation to the remedy provided—*i.e.*, "such relief"—and hence mean no more than that one in custody who claims the right to release can invoke the remedy at any time during that period. So long as a prisoner is in the category of one who claims the right to release, time alone has no effect upon his right to invoke the statute. But the addition of this sentence on "time" did not eliminate either the requirement of custody or the prerequisite of a claim to the right to be released.

3. Interpretation of Section 2255 has been uniform in not extending the statute to a prisoner with concur-

[9] See Report of the Committee submitted at the 1947 Special Session of the Conference. App., *infra*, pp. 49-56, at 49-50.

rent sentences who cannot claim the right to release even if successful. This is in accord with the prior habeas corpus procedure, and, as we have pointed out, is consistent with the general rule that courts will not decide matters which have no material effect upon the rights of the litigant.

The use of habeas corpus for a matter not affecting the claimant's detention has regularly been denied. This Court unanimously held in *McNally* v. *Hill*, 293 U.S. 131, 137-138:

> * * * There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law. Diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.

Accord: *Eagles* v. *Samuels*, 329 U.S. 304, 307; *Holiday* v. *Johnston*, 313 U.S. 342, 349. See also *Ex Parte Watkins*, 3 Pet. 193, 202; *In re Boardman*, 169 U.S. 39, 43. Cf. *Chandler* v. *Fretag*, 348 U.S. 3.

The basic purpose of Section 2255 was to "minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum". *United States* v. *Hayman*, 342 U.S.

205, 219. It should follow that the remedy given by Section 2255 for attacking a judgment is available only where it can result in release.[10]

The lower courts have refused to extend the scope of Section 2255 to the case where the claimant was confronted with concurrent sentences and therefore could not be released even if successful. *Miller* v. *United States*, 256 F. 2d 501, 502 (C.A. 9); *Toliver* v. *United States*, 249 F. 2d 804 (C.A. 9); *United States* v. *McGann*, 245 F. 2d 670, 672 (C.A. 2); *Hoffman* v. *United States*, 244 F. 2d 378, 380-381 (C.A. 9); *Duggins* v. *United States*, 240 F. 2d 479, 482-483 (C.A. 6); *Williams* v. *United States*, 236 F. 2d 894 (C.A. 9), certiorari denied, 352 U.S. 982; *Oughton* v. *United States*, 215 F. 2d 578, 579 (C.A. 9), certiorari denied, 352 U.S. 975. See also *Winhoven* v. *United States*, 209 F. 2d 417, 418 (C.A. 9), dismissing an appeal from *United States* v. *Winhoven*, 14 F.R.D. 18.

In summary—the words, history, purpose, and judicial interpretation all indicate that the post-sentence remedy under Section 2255 is not applicable unless success can result in release. It was intended as a substitute for habeas corpus and the framers seem to have chosen deliberately to keep its confines within those of habeas corpus. Moreover, aside from the specific limitations of the statute's wording and purpose, the remedy ought not to be invoked where the judgment attacked has no present (and in all likelihood no future) impact on any rights of the petitioner.

[10] Section 2255 also provides for correcting a sentence subject to collateral attack. But this involves release, even if temporary, since any continued custody is not under the sentence being attacked. Cf. as to habeas corpus, *In Re Bonner*, 151 U.S. 242.

II

The Petitioner Has Not Alleged Sufficient Facts to Entitle Him to a Hearing Under 28 U.S.C. 2255

The petitioner claims he has alleged sufficient facts to entitle him to have a hearing under Section 2255. Assuming, arguendo, that this question is reached, we think that it appears from the record that the petitioner was not entitled to a hearing on his collateral attack upon the judgment, both because his affirmative allegations do not make a case requiring a hearing and because the record shows that the issues are now foreclosed. Petitioner not only fails to show duress, but is really endeavoring to relitigate his motion to withdraw the plea of guilty which was denied, and the denial of which he did not appeal. He alleges nothing he did not know then and offers no reason for his failure to appeal.

A. The totality of petitioner's allegations, said to constitute the claim of a coerced plea of guilty, are that he was promised leniency in the Southern District as well as the Eastern and did not receive it in the Southern; that thereafter he moved to withdraw his plea in the Eastern District; and that this motion was denied without, he claims, an adequate hearing.

As against these contentions, the record shows that petitioner had an attorney both at the time he entered a plea of not guilty and also when he was allowed to change his plea to guilty. He has never alleged that this attorney was incompetent. Unless we are to relegate the appointment of an attorney to represent an indigent to a mere formalism, it is proper to assume

(absent some showing to the contrary) that he was consulted and that he properly advised petitioner when the latter changed his plea. Nor is this all. The record shows that the petitioner "was fully informed and advised of his rights * * * before acceptance of the plea" (R. 5); that when the petitioner entered his plea of guilty

> he took this step of his own volition and that he was then informed that the court had the power to and might sentence him to imprisonment, without mention of its extent [R. 41].

Again, this is nowhere controverted or denied by petitioner. Petitioner does not allege that anyone promised or could promise him a definite sentence.[11] He had been warned (and knew from experience) that the court determined the sentence not solely on what was said in court, but also upon a pre-sentence investigation. See *United States* v. *Smith*, 257 F. 2d 432 (C.A. 2), certiorari denied, 359 U.S. 926. His contentions therefore do not add up to a proper plea of coercion or

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[11] The affidavits filed by the United States below were not relied upon by the courts below in settling any material fact in dispute (R. 5, 40-42). They were merely the vehicle used to outline the record evidence and only incidentally to deny the merits of petitioner's allegation in case the court decided to have a hearing. See *Walker* v. *Johnston*, 312 U.S. 275 at 284. The affidavits do make clear that the government was prepared, if necessary, to deny petitioner's allegations. Cf. *Price* v. *Johnston*, 334 U.S. 266, 288. But there is no support for the petitioner's present assertion that, by considering the affidavits and denying the motion, "* * * it cannot be said that the court did not hear evidence or require evidence on the motion" (Pet. Br. 14). The denial by the United States was not used by the courts below as a ground for refusing petitioner a hearing, and we do not here rely upon these denials by the government.

undue influence. They are not the equivalent of the alleged threats by government agents held to raise an issue of fact in *Waley* v. *Johnston*, 316 U.S. 101. Most of those accused of crime hope for leniency by pleading guilty. *United States* v. *Harris*, 160 F. 2d 507, 508 fn. 1 (C.A. 2). However, the fact that petitioner (like many others) wished a light or suspended sentence, and later did not think he was going to get one, is not ground for vacation of his sentence. *United States* v. *Page*, 229 F. 2d 91 (C.A. 2); *Sweeden* v. *United States*, 209 F. 2d 524 (C.A. 8); *Meredith* v. *United States*, 208 F. 2d 680 (C.A. 4).

If, despite a showing of proper warning and caution, a petitioner can later allege a coerced plea merely on the basis of disappointed hopes, the door will be open to easy escape from the consequences of guilty pleas. Before a hearing is required under Section 2255, a stronger particularization of the alleged coercion or undue influence should be made than petitioner has essayed here.

B. Moreover, petitioner in essence raised the issue of the validity of his plea by his motion to withdraw it in August 1955 (*supra*, p. 8). His present attack on the denial of that motion furnishes no basis for a hearing under Section 2255. There was no obligation to make any "findings of fact" on the petitioner's original motion. *Smith* v. *United States*, 213 F. 2d 730, 731 (C.A. 6), and cases cited. Rule 32 (d) of the Federal Rules of Criminal Procedure does not impose any such requirement. Cf. Rule 23 (c); *Sullivan* v. *United States*, 348 U.S. 170, 174. If the hearing on his motion to withdraw was, as he claims, inadequate, that was a

matter for direct appellate review. *United States* v. *Swaggerty*, 218 F. 2d 875, 879 (C.A. 7), certiorari denied, 349 U.S. 959; *Friedman* v. *United States*, 200 F. 2d 690, 696 (C.A. 8), certiorari denied, 345 U.S. 926.

Mere trial errors—even those which would most certainly have resulted in reversal—do not in themselves furnish grounds for collateral attack. *Sunal* v. *Large*, 332 U.S. 174. This principle is particularly appropriate in this context. Here was a petitioner who had had counsel when he entered his plea of not guilty and when he changed his plea to guilty. If the denial of permission to again change his plea was a clear abuse of discretion—as he now claims—then was the time to take an appeal, when the facts and circumstances were still fresh. There is no allegation that his attorney was incompetent, nor in the face of this whole record can it be maintained that the petitioner was either barred from taking an appeal or that he did not know how. Consequently, to attempt to review such a ruling now would be improper, for it would amount to allowing an appeal over two years late, even where no excuse for not taking timely action is even suggested. This cannot be done. *United States* v. *Robinson*, No. 16, this Term, decided January 11, 1960.

Actually, the record suggests that petitioner deliberately decided not to appeal. There was little reason why he should have appealed; he had received, not the maximum sentence, but 12 years; and he had received, not a consecutive but a concurrent sentence, one which ran with previous 20-year sentences. Moreover he had an attorney and had had other proceedings in court and thus knew how to proceed. It is significant that

he filed a motion in the Southern District two days after sentence in the Eastern District, but filed nothing in the Eastern District. His subsequent conduct also suggests that his present contention is an afterthought. He filed further actions and took appeals in other courts during 1955 and 1956, but did nothing in the Eastern District. The first motion he filed in the Eastern District was on October 30, 1957, for reduction of sentence; this was denied on November 4, 1957 (R. 48), over two years after the sentence on August 8, 1955. It was not until 1958 that he started the present action, based (he states) upon his conclusion, from studies at the law library at the penal institution, that his 1955 plea was not voluntary. While mere delay is not a ground for denial of a hearing, a prior course of action so inconsistent with the present allegations could properly be taken into consideration with all the other facts of record. In the circumstances presented by this record, where petitioner once raised the issue of the validity of this plea and then apparently abandoned it, to allow him to remain silent and later use a collateral attack remedy would interfere with proper and orderly administration of the criminal law. *Wong Doo* v. *United States*, 265 U.S. 239; *Brown* v. *Allen*, 344 U.S. 443, 486.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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Assistant Attorney General.

Beatrice Rosenberg,
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February, 1960.

APPENDIX

JUDICIAL CONFERENCE DOCUMENTS

A. REPORT OF THE HABEAS CORPUS COMMITTEE, SUBMITTED AT THE 1943 SESSION OF THE CONFERENCE

To the Chief Justice of the United States and Members of the Conference of Senior Circuit Judges:

Your Committee appointed to study the subject of procedure on habeas corpus in the federal courts has given careful study to the subject, aided by officials of the Administrative Office and the Department of Justice. Mr. Will Shafroth of the Administrative Office acted as Secretary of the Committee and made a statistical study of habeas corpus proceedings in the federal courts during the fiscal year 1942. Mr. Alexander Holtzoff of the Department of Justice filed with the Committee a statement as to administrative problems in habeas corpus proceedings, sat with the Committee in the hearings and assisted in the drafting of the legislation proposed. Attached to this report are the statement of Mr. Holtzoff and the statistical tables prepared by Mr. Shafroth.

The Committee met in Washington, D. C., on May 8, 1943, and remained in session for four days during which problems relating to procedure under habeas corpus were fully discussed. It was the opinion of the Committee that the procedure in ordinary habeas corpus proceedings, such as cases arising in connection with removal, with deportation under the immigration laws or with imprisonment under process or judgment void on the face of the proceedings, was simple and well settled; and that no action, legislative or otherwise, was required with respect thereto. With regard to proceedings brought to secure the release of a petitioner imprisoned under the judgment of a state or

federal court, alleged to be void by reason of the disregard of constitutional rights of the petitioner, it was the judgment of the Committee that legislation was necessary to secure orderly procedure, to avoid unnecessary and repeated applications to different judges and to minimize the evil of unseemly conflicts between sentencing and hearing courts and between state and federal tribunals.

The present procedure in habeas corpus was adequate so long as the court hearing the application was held bound by the record made on the trial of a prisoner theretofore convicted in a state or federal court, not only with respect to questions raised on the trial but also with respect to questions that might have been raised, so that matters dehors the record could be considered only to a very limited extent as affecting the validity of the trial. In recent years, however, decisions of the Supreme Court have greatly enlarged the scope of the inquiry in habeas corpus proceedings by making that remedy available to test the validity of a judgment of a state or federal court attacked on the ground that constitutional rights of the prisoner have been violated. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Johnson* v. *Zerbst*, 304 U. S. 458; *Bowen* v. *Johnston*, 306 U. S. 19, 24; *Waley* v. *Johnston*, 316 U. S. 101, 104. As said in the case last cited:

> The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the convic-

tion has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Bowen* v. *Johnston*, 306 U. S. 19, 24.

This review of proceedings in the trial court to determine in an application for habeas corpus, by matters dehors the record, whether conviction of the prisoner has been secured in violation of his constitutional rights, extends to convictions had in state as well as in federal courts. *Smith* v. *O'Grady*, 312 U. S. 329; *Cochran* v. *Kansas*, 316 U. S. 255; *Pyle* v. *Kansas*, — U. S. —, 63 S. Ct. 177; *Sharpe* v. *Buchanan*, — U. S. —, 63 S. Ct. 245; *People* v. *Wilson*, — U. S. —, 63 S. Ct. 840. And when state remedies have been exhausted, there is doubt whether a habeas corpus proceeding can now be dismissed in the federal courts under the doctrine that such remedy will lie in the federal courts only in "rare cases when circumstances of peculiar urgency are shown to exist." See cases last cited. It has been held that habeas corpus will lie where there is allegation that petitioner's imprisonment is in violation of rights guaranteed him by the Constitution and that his remedies under state law have been exhausted. See *Mitchell* v. *Youell*, 4 Cir. 130 F. 2d 880; *Carey* v. *Brady*, 4 Cir. 125 F. 2d 253; *Gall* v. *Brady*, 39 F. Supp. 504.

Where petitioner is imprisoned under the judgment of a state or federal court, and the conviction is attacked as void on the ground that constitutional rights have been denied on the trial, it necessarily results that the court hearing the application for habeas corpus must review the proceedings of the trial court on matters very largely dehors the record. Under the present practice, no provision is made for the trial

judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if heard at all with respect to the matter, he must be heard as an ordinary witness. *Walker* v. *Johnston*, 312 U. S. 275. This has resulted, in one case at least, in the trial judge of a state court appearing as a witness in a habeas corpus proceeding in a federal court and testifying in defense of the proceedings had in his court. *Mitchell* v. *Yowell*, 4 Cir. 130 F. 2d 880. Since state remedies must have been exhausted as a prerequisite to application for the writ, it results in many cases that the federal District Court is reviewing on habeas corpus the constitutional validity of a judgment which has been affirmed on appeal by the highest court of a state, and frequently with respect to matters which have been fully considered on that appeal. It is unnecessary to comment on the real danger involved in a procedure which leads so readily to conflict between the state and federal jurisdictions.

While the practice of having criminal proceedings in one federal District Court reviewed and their validity determined in habeas corpus proceedings by another District Court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, it is the opinion of three of the members of the Committee that this is an abuse which should be corrected, and that the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error coram nobis, and that habeas corpus in another court to raise such question should not be allowed except in those rare cases where the ends of justice imperatively so require.

Another real evil which has arisen in connection with application for habeas corpus by prisoners under sentence is that there is no limitation under existing

law on the number of applications which can be made, and the time of judges is consumed in hearing repeated applications involving identical contentions. Notwithstanding denial of his application, the prisoner, under the present state of the law, has the right to present the same petition to every judge having jurisdiction in the premises. Not infrequently, the same petition is presented, notwithstanding its prior denial, to half a dozen or more judges; and each is bound to give it consideration without any regard to the principle of res adjudicata.

To remedy the evils in the present practice arising out of petitions for habeas corpus by prisoners convicted of crime in the state or federal courts, your Committee has drafted two proposed statutes, copies of which are hereto attached. The purpose of the first, marked "A," is to limit, except in rare cases, the right to apply for habeas corpus on the part of persons imprisoned under a conviction of crime in the state or federal courts and to substitute another remedy by motion in the nature of writ of error coram nobis to test the constitutional validity of the judgments under which they are imprisoned. The second, marked "B", has for its purpose the prescribing of a procedure which will obviate the abuses and inconveniences of the present procedure, in cases where resort to habeas corpus may be appropriate.

Comments on Statute "A", prescribing new remedy and limiting jurisdiction in habeas corpus.

SEC. 1. All of the members of the Committee, except Judge Underwood, are agreed on the first section of the statute as recommended. Judge Underwood agrees that the object of the section is desirable but does not approve of the machinery devised to attain it. It will be observed that the first section applies

only to the case of prisoners in custody under judgments of state courts.

The effect of the section is to require that questions as to the constitutional validity of judgments of state courts be tried in those courts. For this purpose, the statute prescribes that after the making of a motion, in the nature of application for writ of error coram nobis, in the state court, application for certiorari may be made to the Supreme Court of the United States, and that court is given power to review by certiorari the proceedings of the state court. The certiorari will bring before the Supreme Court, not only the record made on the motion, but also the judgment of conviction under which petitioner is imprisoned. The power of Congress to prescribe a remedy in the state courts, by which the deprivation of rights under the Constitution of the United States may be inquired into and record made for review by the Supreme Court of the United States, is not thought by the majority of the Committee to be subject to doubt. The proposed statute denies to federal Circuit and District Judges the power to issue writs of habeas corpus in such cases "unless it appears that there are such exceptional circumstances of peculiar urgency that the rights of the prisoner cannot be effectively preserved by the procedure prescribed."

SEC. 2. Section two applies only to prisoners in custody under judgments of federal courts. The first part of the section provides for a motion, in the nature of a writ of error coram nobis, in the court in which the prisoner was convicted, to question the validity of a judgment assailed on the ground that it was entered in violation of prisoner's constitutional rights. It is believed that this part of the section is merely declaratory of existing law. *Holiday* v. *Johnston*, 313 U. S. 342, 349. All members of the Committee agree on

this part of the section. The last sentence of the section denies to any federal Circuit or District Judge power to release under habeas corpus a prisoner authorized to apply for relief by motion under the section, unless it shall appear that it is not practicable for his rights to be determined on such motion. Judges Stephens, Underwood and Wyzanski do not agree to this sentence; and the second section of the act is accordingly presented in the alternative. It will be observed that alternative section 2 omits the last sentence contained in section 1.

Comments on Statute "B", Procedural Provisions

SEC. 1. Section one is presented in the alternative. The form favored by the majority of the Committee makes it discretionary with a Circuit or District Judge whether or not he shall entertain a petition for habeas corpus to inquire into the detention of a person under sentence of a state or federal court, when it shall appear that the legality of such detention has been determined in a prior application for habeas corpus and no new ground is presented in the present application. Judge Stone and the Chairman are of the opinion that alternative Section 1 should be adopted, the effect of which would be to limit petitioners to one application, unless a new ground is presented.

SEC. 2. The effect of this section is to permit the filing of a statement by the trial judge as to the facts occurring in the trial, in lieu of requiring that his evidence be taken like that of an ordinary witness.

SEC. 3. The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits with proper safeguards.

SEC. 4. The purpose of this section is to make admissible evidence taken in prior habeas corpus proceedings.

SEC. 5. The purpose of this section is to relieve petitioner of the binding effect of an untraversed return, which he inadvertently may have failed to deny, and to give to the answer to a notice to show cause the same evidentiary effect as the return to a writ.

SECS. 6 and 7. The purpose of these sections is to make readily available to the court material portions of records of conviction, and to enable petitioners to have the benefit thereof without cost.

Recommendation to District Courts

The Committee was impressed by a suggestion of Judge Underwood that much could be done to avoid the evils arising from application for habeas corpus by prisoners under sentence of federal courts, if greater care were exercised by trial courts in properly making of record matters as to which such applications ordinarily relate. That suggestion is as follows:

> It would seem that much could be accomplished in this way by a more careful preparation of the trial court records, in view of the rulings of the Supreme Court in the case of *Riddle* v. *Dyche*, 262 U.S. 333, and the more recent case of *Cochran* v. *Kansas*, 316 U.S. 255, in which the Court says, "We accept the court's conclusion that the record, showing that Cochran was represented by counsel throughout, and revealing on its face no irregularities in the trial, is sufficient refutation of his unsupported charge that he was denied the right to summon witnesses and testify for himself." I think it would greatly reduce the number of cases, or at least put them in such shape as to make it possible to dispose of them without great consumption of time, if the trial court, where the defendant is not represented by counsel, would not only carefully advise him of his constitutional rights,

especially that of assistance of counsel, but also, where a plea of guilty is entered, require the plea to be in writing, to be intelligently signed by the defendant and to expressly recite that he has been so advised and tendered counsel and has waived same, in addition to including in the sentence, which is now usually done, a statement of such facts. It is the practice in this Court not only to have the defendant sign the plea but also his attorney, when there is one, to establish the fact of his presence, and also to have the sentence include a recitation of his presence; and to include an express waiver of counsel in writing if there is no counsel. If this were done, many of the cases could be disposed of upon the record and the petitioner sent to the trial court for the correction of the record if he contends that same is incorrect.

Respectfully submitted.

JOHN J. PARKER,
Chairman.
KIMBROUGH STONE.
ALBERT LEE STEPHENS.
EA MARVIN UNDERWOOD.
EDGAR S. VAUGHT.
CHARLES E. WYZANSKI, JR.

JUNE 7, 1943.

STATUTE "A"

A BILL To regulate the review of judgments of conviction in certain criminal cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if a prisoner in custody pursuant to a judgment of conviction of a court of any State, claiming that the judgment is void because in violation of the Constitution or laws of the United States, after exhausting all remedies in the courts of the State, moves in said court to vacate and set aside the judgment and either to discharge him or to resentence him, or to grant a new trial, and if the court denies the motion, or fails or refuses to act thereon within sixty days after it is presented, the prisoner after exhausting whatever rights of review may be accorded by the laws of the State, may apply within three months thereafter to the Supreme Court of the United States for a writ of certiorari. It shall be competent for the Supreme Court by writ of certiorari to require that the cause be certified to it for review and determination. In that event the Supreme Court shall have jurisdiction to review the proceedings had on the motion as well as the judgment of conviction for the purpose of determining the claim that the judgment is void because in violation of the Constitution or laws of the United States. No circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a judgment of conviction of a court of any State, unless it appears that there are such exceptional circumstances of peculiar urgency that the rights of the prisoner cannot be effectively preserved by the proceedings hereinabove prescribed.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment is void, because in violation of the Constitution or laws of the United States, the court shall vacate and set the judgment aside and shall discharge the prisoner, or resentence him, or grant a new trial, as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it is not practicable to determine his rights on such motion because of the necessity of his presence at the hearing, or for other reason.

Judge A. L. Stephens, Judge Underwood, and Judge Wyzanski favor the following substitute for Sec. 2:

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of

the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment is void, because in violation of the Constitution or laws of the United States, the court shall vacate and set the judgment aside and shall discharge the prisoner, or resentence him, or grant a new trial, as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals.

STATUTE "B"

A BILL To regulate habeas corpus proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by any judge of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent judicial decision or the enactment or repeal of a statute.

SEC. 2. On a hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a prisoner pursuant to a judgment of any court of the United States or of any State, the certificate of the judge who presided at the trial re-

sulting in the judgment of conviction, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SEC. 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SEC. 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SEC. 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the Judge shall find from the evidence that they are not true.

SEC. 6. On an application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SEC. 7. If on any applicaation for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis,

the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

Judge Parker and Judge Kimbrough Stone favor the following substitute for Sec. 1:

That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time.

[Statistical tables and memorandum of Mr. (now judge) Holtzoff omitted in printing.]

B. Supplemental Report

September 28, 1943.

To the Chief Justice of the United States and Members of the Conference of Senior Circuit Judges:

Your Committee to study the subject of procedure on habeas corpus in the federal courts, after receiving letters from various judges throughout the United States, held a meeting in Washington on Monday, September 27, considered same, and begs leave to submit the following supplemental report.

1. The Committee recommends as a substitute for Statute A, Section 1, the following:

> No Circuit or District Judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any state, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis or otherwise in the courts of the state. Where a prisoner in custody pursuant to a conviction of a court of any state, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a state court by habeas corpus, writ of error coram nobis or otherwise, files a petition for writ of habeas corpus before any Circuit or District Judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue same and shall call to his assistance two other judges so chosen that at least one of the three shall be a Circuit Judge or a Circuit Justice, who shall constitute a special court for the hearing of such petition. Appeal shall lie from such court directly to the Supreme Court of the United States. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing same, he shall dismiss the petition, to which action an appeal shall lie to the Circuit Court of Appeals for the Circuit. The phrase "no adequate remedy" as used in this section means absence of state cor-

rective process or existence of exceptional circumstances of peculiar urgency.

2. Lines 26-27 of Statute A, Section 2, for the words "that the judgment is void because", substitute the words "the right to be released on the ground that the judgment has been obtained."

Line 34. For the words "is void because," substitute the words "has been obtained."

Line 46. For the words "that the judgment is void because", substitute the words "the right to be released on the ground that the judgment has been obtained."

Line 54. For the words "is void because", substitute the words "has been obtained."

3. Statute B, Section 1. Line 6. After the word "judge" insert the words "or court."

4. Your Committee considered a suggestion to the effect that a judge in a habeas corpus proceeding should have discretionary authority to dispense with the production of the prisoner in court, with the provision that his testimony be taken by deposition or before a commissioner. Your Committee was of the opinion that the laws should not be changed in this respect.

5. Your Committee suggested that section 832 of Title 28 U. S. C. be amended to permit an alien as well as a citizen to prosecute a habeas corpus proceeding in forma pauperis.

JOHN J. PARKER.
Chairman, for the Committee.

C. REPORT OF THE HABEAS CORPUS COMMITTEE SUBMITTED AT THE 1947 SPECIAL SESSION OF THE CONFERENCE

Report of Habeas Corpus Committee

To the Chief Justice of the United States and the Judicial Conference of Senior Circuit Judges:

The Committee on Habeas Corpus Procedure, to which the Conference referred the "jurisdictional bill," H. R. 6723 79th Congress 2d Session, for further consideration and action, met pursuant to the call of the Chairman in the Supreme Court Building in Washington, D. C., on Monday, December 16, 1946, with all members of the Committee present except Judge Kimbrough Stone, whose attendance was prevented by the illness of his wife. Also in attendance were Judge Maris of the Third Circuit, Judge Holtzoff of the District of Columbia, Messrs. Whitehurst and Shafroth of the Administrative Office, and Messrs. Bergson and Bainton of the Department of Justice.

The Committee first gave consideration to the one year limitation provision, which is not contained in the original bill as approved by the Conference. The Committee was of the opinion that it was neither feasible nor desirable to include this limitation in the bill. Habeas corpus can be availed of for the release of one imprisoned under the judgment of a court only if the judgment is void; and, if the judgment is void, no time limitation should be asserted against the release of one improperly deprived of his liberty under it. This is true, whether the invalidity of the judgment results from the fact that the court has transcended its jurisdiction, or from the fact that it has lost jurisdiction through disregard of constitutional limitations. Representatives of the Department of Justice, who had

originally insisted upon the limitation, withdrew support of it and concurred in the views of the Committee.

The Committee next gave consideration to the provision contained in the original bill for a special court of three judges to hear cases involving the validity of the judgment of a state court, where the application for habeas corpus is found by a District Judge to be meritorious. The Committee was of opinion that this provision should be restored. It is a serious matter to permit a court of the United States to try the proceedings had in a state court and hold them for naught, especially, as is frequently the case, where the proceedings of the state court have been approved and confirmed by the highest court of the state. Such setting aside of state action is certainly no less serious than the setting aside of a state statute or the action of a state administrative board, as to which action by three judges is required. To constitute a court of three judges for the hearing of such matters provides a fact finding court of a standing comparable to that of a Circuit Court of Appeals; and direct review by the Supreme Court obviates delay and gives direct control over the proceedings to the only federal court whose review of state court action has historical basis.

It should not be overlooked in this connection that not until recently was it possible for proceedings in a state court to be reviewed by any federal court except the Supreme Court of the United States, where review was by appeal, writ of error or certiorari. The expansion of the habeas corpus remedy under recent decisions, however, has made it possible for a federal District Court to try the proceedings of the state court on matters dehors the record; and cases have arisen in which the judge of a state court and lawyers who participated in a trial before him have been hailed into the federal court and examined as witnesses as to the regu-

larity and propriety of the state court proceedings. It is the view of the Committee that, when power of this sort is exercised, a court of three judges should be convened to insure, on the one hand, that the power of the state courts shall not be infringed or belittled and, on the other, that prompt relief may be afforded in proper cases.

In order that the courts may not be unduly harassed by the necessity of convening three judges to hear frivolous applications, the bill provides that, if the judge before whom the application is filed, shall determine that no reasonable ground exists for the issuance of the writ, he shall dismiss the petition, and that appeal from this action shall lie to the Circuit Court of Appeals, and not to the Supreme Court. It is believed that most of the groundless petitions with which the courts have been harassed in recent years could be disposed of under this provision, and that only in rare instances would it be necessary to convene a court of three judges. The machinery, however, would always be available to deal with any meritorious case that might arise.

Fear has been expressed that the provision for direct review of the three judge court by the Supreme Court will increase the labors of the latter court; but it is believed that this fear is not well founded. It will be observed that the review provided is by certiorari; and the Supreme Court by denying the writ can protect itself against reviews which are groundless with no more labor than is involved in considering such applications under the present system. The thought occurs that if this legislation were adopted, the Supreme Court would find in its provisions a solution of the difficulty presented by the increasing number of applications for habeas corpus made to it directly by persons imprisoned under judgments of state courts. With this final

chinery for the proper hearing of evidence and apprisal of facts, the court might well require that all applications for habeas corpus assailing the validity of state court judgments be handled through it, so that a proper record might be made before the case was brought to hearing in the Supreme Court. This would relieve the Supreme Court of the burden of hearing a multitude of groundless applications and would not impair the power of the Court to exercise original jurisdiction in those rare and exceptional cases which call for its exercise.

Your Committee has accordingly redrafted H. R. 4233 of the 79th Congress 1st Session, the bill originally approved by the Conference, with certain verbal changes which are thought to make its meaning clearer, and submits it with the recommendation that it be approved by the Conference and that its passage be recommended to Congress. Your Committee deems it unnecessary to repeat what has already been said with respect to the desirability of the enactment of legislation embodying the second section of the act, the purpose of which is to require that attacks by a prisoner upon a judgment under which he is held in custody, be made if possible, in the sentencing court and not in the court of the district where he is imprisoned; so as to avoid the unseemly procedure of one district court's being required to try the procedure of another district court upon the mere application of one who has been convicted of crime by the latter.

While the Conference did not re-refer to the Committee the procedural bill aproved by the Conference, H. R. 4232, 79th Congress 1st Session, the Committee thought it not improper to give consideration to its provisions. The Committee again approves the bill, except that three members of the Committee, Judges Stephens, Underwood and Wyzanski, think that the language immediately following the enacting clause

should be "That no Circuit or District Judge shall *be required to* entertain" etc., ~~instead of~~ "shall entertain" etc. as at present contained in the bill. Their view is that the act should make the entertaining of subsequent petitions for habeas corpus discretionary with the judge instead of establishing the rule of res judicata to the extent proposed by the bill. These judges are attaching to this report a memorandum of their views in regard to this matter and Judge Stephens, who expects to attend the next meeting of the Conference, will, in addition, state his views orally to the Conference.

Attached hereto are copies both of the jurisdictional bill as approved by the Committee and the procedural bill as approved by the Conference, as to which the Committee as a whole suggests no changes but three members of the Committee propose the change above outlined.

JOHN J. PARKER,
Chairman.
ALBERT LEE STEPHENS.
E. MARVIN UNDERWOOD.
EDGAR S. VAUGHT.
CHAS. E. WYZANSKI, JR.

The report is not signed by Judge Kimbrough Stone.

MARCH 1, 1947.

A BILL. To regulate the review of judgments of conviction in certain criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity under the Constitu-

tion, treaties or laws of the United States of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceedings, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. Where a prisoner in custody pursuant to a conviction of a court of any State, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a State court by habeas corpus, writ of error coram nobis, or otherwise files a petition for writ of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a district court of three judges to be constituted as provided by section 266 of the Judicial Code, as amended (28 U.S.C. 380a), who shall constitute a court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court of the United States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the circuit court of appeals for the circuit, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76), entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended" (35 Stat. 40, 28 U.S.C. 466). The phrase "no adequate remedy," as used in this section means absence of State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties or laws of the United States, or that the court was without jurisdiction, or that the sentence was not authorized by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless the court shall determine that the motion on its face presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other rea-

sons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1950

SUPREME COURT OF THE UNITED STATES

No. 153.—October Term, 1959.

Clarence Duke McGann, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 21, 1960.]

Per Curiam.

The writ of certiorari was improvidently granted and must be dismissed. When the case was brought here, on the meager documentation which so often is all that is presented by indigent prisoners seeking review on their own behalf, we assumed that a question involving the construction of 28 U. S. C. § 2255 called for adjudication. After argument, it became clear that the question of construction is not appropriately presented by the record because petitioner's claim upon the merits was fully considered and decided below, and we find his challenge of that action to be so insubstantial as not to have warranted bringing the case here.